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IN THE

Supreme Court of the United States

OCTOBER TERM, 1932.

No. 499.

THE MOFFAT TUNNEL LEAGUE

and

UINTAH BASIN RAILROAD LEAGUE, VOLUNTARY ASSOCIATIONS,
Appellants,

vs.

UNITED STATES OF AMERICA,
INTERSTATE COMMERCE COMMISSION,
THE DENVER AND RIO GRANDE WESTERN RAILROAD COMPANY,
A Corporation, *Appellees.*

STATEMENT AS TO JURISDICTION ON APPEAL.

ALBERT L. VOGL,
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Solicitor for Appellants.

PRESS OF BYRON S. ADAMS, WASHINGTON, D. C.

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STATEMENT AS TO JURISDICTION ON APPEAL.

The appellants respectfully present the following statement of the grounds upon which it is claimed this Court has jurisdiction to review this case on appeal.

I.

STATEMENT OF THE CASE.

This is an appeal from a decree of the District Court of the United States for the District of Delaware—a three

judge Court constituted as provided by 28 U. S. C. A. Section 47. The opinion of the lower court is reported in 59 Fed. Rep. 2nd 760. The plaintiffs, who are the appellants here and will be hereafter referred to as plaintiffs, filed their bill to enjoin and set aside an order of the Interstate Commerce Commission purporting to authorize The Denver and Rio Grande Western Railroad Company to acquire control, by stock purchase, of The Denver and Salt Lake Railway Company.

The suit was filed against the United States of America, Interstate Commerce Commission, and The Denver and Rio Grande Western Railroad Company. The Denver and Salt Lake Railway Company and other interested parties intervened.

Motions to dismiss the petition based upon a challenge of the right of the plaintiffs to institute and maintain the suit were filed by defendants and answers upon the merits were also filed by the defendants and interveners. The case was heard in the lower court upon plaintiffs' application for a temporary injunction and upon the motions to dismiss.

On stipulation of counsel, it was agreed that the record which would be presented upon a final hearing would be the same as that presented on the application for temporary injunction and motion to dismiss and that, therefore, final decision could be entered upon the record as so made.

The Court granted the motions to dismiss, and also "to make the judgment complete, the prayer of the petition for a preliminary injunction, is, after full hearing, denied, and the prayer for a permanent injunction (on a stipulation of counsel that the case on the hearing should stand submitted for final decision), is denied". 59 Fed. Rep. 2nd 760 (766).

The circumstances out of which this cases arises are as follows:

February 1, 1930, The Denver and Rio Grande Western Railroad Company—hereinafter referred to as the Rio

Grande—filed an application with the Interstate Commerce Commission—hereinafter referred to as the Commission—under Sec. 5, Par. 2 of The Interstate Commerce Act (U. S. C. A. Tit. 49, Sec. 5, Par. 2) for an order authorizing the Rio Grande to acquire, by stock purchase, control of The Denver and Salt Lake Railway Company, hereinafter referred to as the Moffat Road. Plaintiffs were granted leave to intervene and thereafter participated in all hearings before the Commission.

Plaintiff The Moffat Tunnel League represents communities, property owners, and residents in Western Colorado, all within the territory included in "The Moffat Tunnel Improvement District", all real estate within which District is subject to the lien of the Moffat Tunnel bonds. The legality of those bonds was sustained by this Court in Milheim vs. Moffat Tunnel Improvement District, 262 U. S. 710 (67 Law. Ed. 1194). The plaintiff Uintah Basin Railroad League represents similar interests in Eastern Utah (outside of the Moffat Tunnel Improvement District) in the territory which would be served by the Moffat Road if it were extended to Salt Lake; plaintiffs claim that one of the purposes of the public construction of the Moffat Tunnel was to insure the construction of this extension to Salt Lake City, and that one of the purposes of the Rio Grande in the acquisition of control of the Moffat Road is to prevent that extension.

The application was granted by the Commission September 15, 1931, (Denver and Salt Lake Railway Company Control,175 I. C. C. Rep. 542). Thereupon plaintiffs filed this suit in the District Court of the United States for the District of Delaware (the Rio Grande being a Delaware corporation) to enjoin and set aside the order of the Commission.

The grounds upon which plaintiffs sought to set aside the order of the Commission were that the Commission did not hold a "hearing" as required by law, on the question of whether the acquisition of control prayed for by the

Rio Grande "will be in the public interest", because at the hearings held by the Commission, the Commission refused to receive and refused to consider material and relevant evidence offered by plaintiffs and others, concerning the effect upon "public interest" which such acquisition would have.

II.

STATUTORY PROVISIONS.

The suit was instituted in the Federal Court under Par. 28 of Sec. 41 of Title 28, U. S. C. A., giving the Federal District Courts original jurisdiction of "cases brought to enjoin, set aside, annul or suspend * * * any order of the Interstate Commerce Commission".

The hearing was before a three judge court as provided by Sec. 47 of Title 28, U. S. C. A.

The appeal was taken to this Court under the provisions of the same Section 47, which provides:

> "An appeal may be taken direct to the Supreme Court of the United States from the order granting or denying, after notice and hearing, an interlocutory injunction, in such case if such appeal be taken within thirty days after the order, in respect to which complaint is made, is granted or refused; and upon the final hearing of any suit brought to suspend or set aside, in whole or in part, any order of said commission the same requirement as to judges and the same procedure as to expedition and appeal shall apply. (Oct. 22, 1913, c. 32, 38 Stat. 220.)"

And also Section 47a, Title 28 U. S. C. A. (Judicial Code Section 210), which provides:

> "A final judgment or decree of the district court in the cases specified in section 44 of this title may be reviewed by the Supreme Court of the United States if appeal to the Supreme Court be taken by an aggrieved party within sixty days after the entry of such

> final judgment or decree, and such appeals may be taken in like manner as appeals are taken under existing law in equity cases. * * * The Supreme Court may affirm, reverse, or modify as the case may require the final judgment or decree of the district court in the cases specified in section 44 of this title."

Section 44 referred to includes suits to set aside orders of the Interstate Commerce Commission.

III.

DECREE AND PETITION FOR APPEAL.

The Decree was entered in the District Court, July 7th, 1932.

Petition for Appeal was filed July 18th, 1932, and allowed by the District Court July 18th, 1932.

IV.

QUESTIONS INVOLVED.

Four points were decided by the District Court which were as follows:

A. That the plaintiff cannot institute this suit because they do not have a legal interest in the Commission's order and cannot sustain a legal injury by reason of it.

B. That the plaintiffs cannot maintain this suit because they are voluntary unincorporated associations.

C. That the Commission did not improperly exclude evidence offered by the plaintiffs.

D. That some of the evidence excluded by the Commission was offered by parties other than plaintiffs, and that even if such exclusion was improper plaintiffs cannot complain because that evidence was offered by parties other than the plaintiffs.

V.

AUTHORITIES SUSTAINING JURISDICTION.

A permissive order of the Commission permitting a carrier to do something otherwise prohibited, is subject to judicial review.

> Baltimore and Ohio Railroad Co. vs. United States, 264 U. S. 258 (263), 68 Law. Ed. 667 (673).

A direct appeal lies to this Court under Section 47, U. S. C. A. Title 28, and Section 47a, Title 28, U. S. C. A., being Section 210 of the Judicial Code, from a dismissal of a suit to enjoin or set aside an order of the Interstate Commerce Commission after hearing, by a three judge court, under said Section 47, on plaintiffs' motion for temporary injunction and defendants' motion to dismiss, where parties agree that final order may be entered upon such hearing.

> Baltimore and Ohio R. R. Co. vs. United States, *supra.*
> Louisville & N. R. R. Co. vs. United States, 242 U. S. 60 (61 L. Ed. 152).
> Transit Commission vs. United States, 284 U. S. 360 (76 Law. Ed. 342).
> State of Colorado vs. United States, 271 U. S. 153 (70 Law. Ed. 378).
> Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (76 Law. Ed. 808).

The question whether the plaintiffs have such a legal interest in the order of the Commission as will permit them to maintain this suit or whether they will suffer a legal injury by such order, will be determined by this Court on appeal.

> Western Pac. Cal. R. Co. vs. Southern Pac. Co., 284 U. S. 47 (76 Law. Ed. 160).
> Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (390), 76 Law. Ed. 808 (814).
> Baltimore and Ohio R. R. Co. vs. United States, 264 U. S. 258 (266-8), 68 Law. Ed. 667 (674-5).

The statute requires a full and fair hearing before the Commission in a case of the nature of that here involved; this Court will review the proceedings before the Commission to determine whether there was such a hearing.

Baltimore and Ohio R. R. Co. vs. United States, 264 U. S. 258 (265), 68 Law. Ed. 667 (674).
United States vs. Abilene & S. R. Co., 265 U. S. 274 (288-9), 68 Law. Ed. 1017 (1023).
Colorado vs. United States, 271 U. S. 153, (168-9), 70 Law. Ed. 878 (885-6).
Claiborne-Annapolis Ferry Co. vs. United States, 285 U. S. 382 (392), 76 Law. Ed. 808 (815).
Georgia Public Service Com. vs. United States, 283 U. S. 765 (769-770), 75 Law. Ed. 1397 (1402-3).

Respectfully submitted,

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